

**UNITED STATES DISTRICT COURT**  
**WESTERN DISTRICT OF LOUISIANA**  
**LAKE CHARLES DIVISION**

<b>JOE ALLAN BOUNDS</b>	<b>:</b>	<b>DOCKET NO. 2:05-cv-232</b> <b>Section P</b>
<b>VS.</b>	<b>:</b>	<b>JUDGE MINALDI</b>
<b>J. P. YOUNG, WARDEN, ET AL.</b>	<b>:</b>	<b>MAGISTRATE JUDGE WILSON</b>

**REPORT AND RECOMMENDATION**

Currently before the court is a petition for writ of *habeas corpus* filed by *pro se* petitioner, Joe Allan Bounds, pursuant to 28 U.S.C. §2241. By this petition, the petitioner seeks to challenge his sentence. This matter has been referred to the undersigned magistrate for review, report, and recommendation in accordance with 28 U.S.C. § 636(b)(1)(B).

**FACTS**

Petitioner states that he was convicted by a jury of a conspiracy involving "a measurable amount" of amphetamine or phenylacetone in the United States District Court for the Western District of Louisiana. For his conviction, he was sentenced to 324 months imprisonment to be followed by 3 years of supervised release. The jury verdict did not specifically identify either the controlled substance or the amount of the controlled substance that was involved. Nevertheless, he states that he was given a base offense level of 32 based upon a finding by the sentencing court that 5.3 kilograms of phenylacetone was involved. Additionally, petitioner was given a four point "leadership" enhancement under the Federal Sentencing Guidelines. He contends that in determining his offense level and subsequent guideline range, the sentencing court relied on facts which were not

charged an the indictment, presented to a jury, admitted by him, or proven beyond a reasonable doubt. Relying on the recent Supreme Court cases of *United States v. Booker*, — U.S. —, 125 S.Ct. 738 (2005) and *Blakely v. Washington*, — U.S. —, 124 S.Ct. 2531 (2004), the petitioner claims that his sentence was unlawfully enhanced under the Federal Sentencing Guidelines. He claims that without the judicial finding as to quantity and the 4 point "leadership" enhancement, his offense level would have been 12 which would have subjected him to a maximum term of 37 months imprisonment. Because he has been imprisoned since 1988, he seeks to have the court order his immediate release from custody.

Petitioner has previously challenged his sentence on direct appeal and by filing several Motions to Vacate under § 2255 with the sentencing court. He specifically files this petition under 28 U.S.C. § 2241, claiming that the remedy provided by § 2255 is inadequate and ineffective to challenge his detention.

### **LAW AND ANALYSIS**

Generally when a federal prisoner seeks to collaterally attack the legality of his conviction or sentence, he must do so by filing a petition under 28 U.S.C. § 2255. *See Reyes-Requena v. United States*, 243 F.3d 893 (5<sup>th</sup> Cir. 2001); *Cox v. Warden, Fed. Detention Center*, 911 F.2d 1111 (5<sup>th</sup> Cir. 1990). In order to utilize 28 U.S.C. § 2241 to challenge his conviction or sentence, the petitioner must satisfy the “savings clause” of 28 U.S.C. § 2255 by demonstrating that the remedy afforded by § 2255 is inadequate or ineffective to test the legality of his detention. *See Jeffers v. Chandler*, 253 F.3d 827, 830 (5<sup>th</sup> Cir. 2001); *Reyes-Requena v. United States*, 243 F.3d 893 (5<sup>th</sup> Cir. 2001); *Pack v. Yusuff*, 218 F.3d 448, 452 (5<sup>th</sup> Cir. 2000); *Cox v. Warden, Fed. Detention Center*, 911 F.2d 1111 (5<sup>th</sup> Cir. 1990). A prior unsuccessful §2255 motion, or the inability to meet the AEDPA’s second

or successive requirement, does not make §2255 inadequate or ineffective. *Jeffers*, 253 F.3d at 830; *Tolliver v. Dobre*, 211 F.3d 876, 878 (5<sup>th</sup> Cir. 2000).

The petitioner bears the burden of demonstrating that a §2255 remedy is ineffective or inadequate. *Reyes-Requena*, 243 F.3d at 902; *Pack*, 218 F.3d at 452; *Jeffers*, 253 F.3d at 830. In order to file a 28 U.S.C. § 2241 petition for writ of *habeas corpus* pursuant to the savings clause of 28 U.S.C. § 2255, the petitioner must show:

1. His claims are based upon a retroactively applicable Supreme Court decision which establishes that petitioner may have been convicted of a non-existent offense; and
  2. His claims were foreclosed by circuit law at the time when the claims should have been raised in his trial, appeal, or first 28 U.S.C. § 2255 motion.
- Padilla v. Dobre*, 101 Fed. Appx. 469 (5<sup>th</sup> Cir. 2004); *Reyes-Requena*, 243 F.3d at 904; *Jeffers*, 253 F.3d at 830; *Christopher v. Miles*, 342 F.3d 378, 382 (5<sup>th</sup> Cir. 2003).

In order to satisfy the first prong of this test, the petitioner relies on the recent Supreme Court cases of *Blakely* and *Booker*. In *Booker*, the Supreme Court extended to the Federal Sentencing Guidelines the rule announced in *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-63 (2000) and reaffirmed in *Blakely* that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Booker*, 125 S.Ct. at 756; *see also In re Elwood*, 408 F.3d 211, 212 (5<sup>th</sup> Cir. 2005). The *Booker* Court also excised certain statutory provisions that made the Guidelines mandatory, thereby rendering them advisory only. *Booker*, 125 S.Ct. at 756-57. Petitioner argues that pursuant to these decisions, his sentence of 324 months was unconstitutional.

However, despite petitioner’s arguments to the contrary, he is not able to satisfy the first prong of the savings clause test. His claim does not implicate his conviction for a substantive

criminal offense and the Supreme Court has not expressly declared *Blakely* or *Booker* retroactively applicable to cases on collateral review. In fact, the Supreme Court has strongly suggested that *Apprendi* and, by logical extension, *Blakely* and *Booker* do not apply retroactively on collateral review. *In re Elwood*, 408 F.3d at 213, citing *Schriro v. Summerlin*, 124 S.Ct. 2519, 2526 (2004)(holding that *Ring v. Arizona*, 124 S.Ct. 2519 (2004), which extended *Apprendi* to facts increasing a defendant's sentence from life imprisonment to death, established a new procedural rule that does not apply retroactively to cases already final on direct review.). Further, the Fifth Circuit and all other circuit courts to consider this issue have concluded that *Booker* does not apply retroactively on collateral review. See *In re Elwood*, 408 F.3d 211 (5<sup>th</sup> Cir. 2005); *Guzman v. United States*, 404 F.3d 139 (2<sup>nd</sup> Cir. 2005); *In re Olopade*, 403 F.3d 159 (3<sup>rd</sup> Cir. 2005); *McReynolds v. United States*, 397 F.3d 479 (7<sup>th</sup> Cir. 2005), *petition for cert. filed*; *United States v. Price*, 400 F.3d 844 (10<sup>th</sup> Cir. 2005); *In re Anderson*, 396 F.3d 1336 (11<sup>th</sup> Cir. 2005); *In re Hinton*, 2005 WL 566608 (D.C. Cir. 2005) (not designated for publication); *see also Wesson v. U.S. Penitentiary, Beaumont, TX*, 305 F.3d 343 (5<sup>th</sup> Cir. 2000)(holding *Apprendi* does not apply retroactively to cases on collateral review and an *Apprendi* claim does not satisfy the requirements for filing a habeas petition under the savings clause of § 2255). The holdings in *Blakely* and *Booker* are essentially an extension of the procedural rule expressed in *Apprendi*, and as such do not apply retroactively on collateral review. *See Schriro*, 124 S.Ct. at 2523; *Varela v. United States*, 400 F.3d 864, 868 (11<sup>th</sup> Cir. 2005)(“*Booker's* constitutional rule falls squarely under the category of new rules of criminal procedure that do not apply retroactively to § 2255 cases on collateral review.”).

Because petitioner has failed to satisfy the savings clause of § 2255, he cannot utilize 28 U.S.C. § 2241 to challenge his sentence, and this court is without jurisdiction to consider the

petition. *See Christopher*, 342 F.3d at 385.

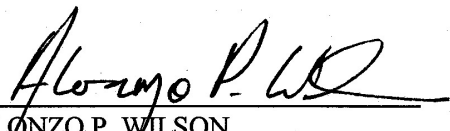
Accordingly,

IT IS RECOMMENDED that this petition for writ of *habeas corpus* filed pursuant to 28 U.S.C. § 2241 be DISMISSED for lack of jurisdiction.

Under the provisions of 28 U.S.C. §636(b)(1)(C), the parties have ten (10) business days from receipt of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge prior to a final ruling.

**FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING ON APPEAL, EXCEPT UPON GROUNDS OF PLAIN ERROR, THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT COURT.**

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 5<sup>th</sup> day of July, 2005.

  
ALONZO P. WILSON  
UNITED STATES MAGISTRATE JUDGE